. . Detained for Questioning . . . .

by "SOLICITOR"

HALDANE SOCIETY

3D

INTRODUCTION

THE SUBJECT OF POLICE POWERS and procedure was enquired into by a Royal Commission whose report was issued in 1929 (cmd 3297, 3/-, H.M. Stationery Office). This commission was set up because of public disquiet following the case of Miss Savidge in 1928. It is often said that it is 20 to 30 years before a Royal Commission's recommendations are carried out and certainly little has been done as a result of this report. The Haldane Society is not content to wait 20 years for this report to be acted on. Too long a period has already elapsed.

The Society, therefore, submits the following analysis by "Solicitor" * of the fate of part of the 1929 report. This publication is designed to call the attention of the public to the urgent need for alteration of the law relating to the police and to suggest that the recommendations of this Royal Commission should now be carried into effect. The Society will welcome comments on the idea herein expressed which should be addressed to the Hon. Secretary, Stephen Murray, at 4 Paper Buildings, Temple, London, E.C.4.

* author of "English Justice."

SOME OBSERVATIONS ON THE RECOMMENDATIONS OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE

By " SOLICITOR "
(Author of " English Justice ").

THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE reported on 16th March, 1929. It was appointed, in effect though not of course in form, by Sir William Joynson-Hicks, as he then was, so it may be taken that its composition was by no means of a revolutionary character. Its unanimous recommendations have been, for practical purposes, ignored.

Personal liberty is the basis of all other rights. Magna Charta enacts that no freeman shall be taken or imprisoned, but by the lawful judgment of his peers, or by the law of the land. With those who are imprisoned by the lawful judgment of their peers, *i.e.*, after trial and sentence, we are not here concerned, but encroachments upon personal liberty beyond those authorized by the law of the land are increasingly common. The powers of arrest possessed by the Police are wide, and are derived from the Common Law in respect of treasons, felonies and breaches of the peace, particular statutes authorizing arrests in connexion with certain other offences, and under magistrates' warrants. (See the Report of the Royal Commission on Police Powers and Procedure, p. 51, par. 136 for details. This Report is hereafter referred to as " the Report.") But a practice has grown up of using the prestige of the police and the uncertainty which exists in the mind of the ordinary citizen, and, indeed, among many of the legal profession, as to the extent of the powers of the police, to commit infringements upon the right of personal liberty. The most usual of these infringements are known as " Detention on Suspicion," and " Detained for questioning." Most people must have seen paragraphs in the newspapers in connexion with almost every serious crime in respect of which an arrest is not at once made, to the effect that such-and-such a man has been " detained for questioning " or that some person has been brought to the police station for questioning and subsequently charged. On the day this was written, a man was " detained for questioning " at a London police station. There has been another instance since (see *Daily Telegraph,* 6th June, 1939). Among what may be called the part-time criminal class it is a common experience, whenever some local theft or house-breaking has occurred, to be taken to the police station for questioning. A reference to this practice will be found on p.57, par. 154 of the Report. Persons who are required for questioning are simply fetched by the police in exactly the same way as if they were being legally arrested. It is seldom suspected by the person whose liberty is infringed that there is anything illegal in what is done, and, indeed, the police often contend that this procedure is legal. (See p. 56, par. 151 of the Report.) The writer may add that he has himself seen and heard detention for questioning. He

has also, so far does the belief in police powers go, had the utmost difficulty in preventing a man concerned in a motoring offence, from going to a police station and making a statement, as the police had ordered him to do. This man was visited on at least three separate occasions and ordered to go to the station and make a statement, although the police were aware that he did not wish to go and was legally represented.

A somewhat similar case occurred in June, 1942. A client of mine was visited by the police and asked to make a statement. He did not wish to do so for what appeared to be sufficient reasons, and I advised him that he was not obliged to say anything, and wrote to the police telling them he did not wish to make a statement. After this the man was visited several times by the police and, according to him, told to take no notice of what I told him and that a statement must be made. He still refused, but after each visit came to see me in a distressed state. I reported the matter to the local Watch Committee but no action was taken.

That this detention is in law an imprisonment is clear (see Home Office Memorandum quoted on p. 55 in par. 148 of the Report) and, as the Report says, the various forms of " detention " all involve a form of deprivation of liberty for which the Police alone are responsible and which the Police can end at will, often without keeping any permanent record. The Report, in par. 45 of its summary of conclusions and recommendations, says:

> " ' Detention ' as a separate procedure is unnecessary and open to abuse, in that no definite limit is placed to the period during which persons may be ' detained '."

Notwithstanding this, the practice continues and is probably on the increase. The danger to the liberty of the subject inherent in what amounts to imprisonment at the will of the police is obvious. The procedure of the " delayed charge " subject to the safeguards recommended in par. 146, p. 54 of the Report, gives the police all the powers that it is safe for them to have. And the safeguards should be strictly enforced, not treated like the " Judges' Rules," as a counsel of perfection to be ignored whenever possible.

The Report is very clear as to the Commission's disaproval of the questioning of persons in custody. Its recommendation is worth quoting in full:

> " A rigid instruction should be issued to the Police that no questioning of a prisoner, or a ' person in custody,' about any crime or offence with which he is, or may be, charged, should be permitted. This does not exclude questions to remove elementary and obvious ambiguities in voluntary statement, under No. 7 of the Judges' Rules, but the prohibition should cover all persons who, although not in custody, have been charged and are out on bail while awaiting trial."

This recommendation has not been put into force, and the practice of questioning persons under arrest or detained in the cells is probably on the increase. What is called in the United States the Third Degree is commonly used in a modified form. To what extent actual personal violence was ever used is doubtful. In the nature of things the evidence against the Police could only be that of the man concerned, and in the writer's experience complaints of violence, actual or threatened, have died out since the Commission's Report. Since the war, however, the writer has had several complaints, whether well-founded or otherwise he cannot say. It must be

remembered, however, that the atmosphere of a police station, and especially of the cells, is itself intimidating, and that a man who is confined there, whether arrested or "detained," is made well aware that he is absolutely in the hands of the police. The essential feature of the "Third Degree" is the constant repetition of questions to a person "under duress." The extent to which this procedure is used may be doubtful. That it is used is certain, the writer having actually seen and heard it. The mere questioning of a person in custody, especially when accompanied by suggestions that he can have bail if he will answer (with, of course, the implied threat that he will be kept in the cells till he does) partakes of the nature of the Third Degree, and this is often done.

The common practice of arresting a man on a minor charge, and, while he is in custody, questioning him with regard to a more serious crime of which he is suspected, is obviously an evasion of the Judges' Rules, and, according to the Commission's Report, is to be deprecated. It is clear that a person so questioned is under duress. The practice was approved by the then Director of Public Prosecutions (see Report p. 59, par. 159) and continues. So far does it go that it is usual for the police, when they have a person with a criminal record in custody, to notify the police of neighbouring districts, so that they may, if they wish, come over and question the prisoner. The writer has known a man, while detained in the cells at a police station, to be visited and questioned by the police from three neighbouring towns. Another matter often complained of by accused persons is the alleged practice of visiting a prisoner in the cells during the night, waking him up, and questioning him while half-awake.

Another practice which is opposed to the spirit, and indeed the letter, of the Judges' Rules is the manner in which a copy of the statement made by one prisoner is furnished to the other person or persons charged. No. 8 of the Judges' Rules specifically lays down that when furnishing a copy of such a statement "nothing should be said or done by the police to invite a reply." In practice everything possible short of a direct request, and sometimes not stopping short of even that, is done to invite a statement in reply. It is within the writer's knowledge that men have actually been fetched to a police station to be served with a copy of a statement. It often happens that two officers go together to a cell to furnish to a prisoner a copy of a statement. The second officer goes to corroborate the first officer's version of the prisoner's reply when furnished with a statement. This fact has been brought out by the writer in cross-examination in several cases.

Falsely to tell one prisoner that another has made a statement giving him away, in the hope that he may either retaliate or confess, thinking the game is up, is another trick often used. One of the main objections to this is that it is quite likely to provoke a false, or partly false, accusation against the other man concerned.

It is probable that few of the so-called "Voluntary Statements" which are produced in the courts in such numbers are really voluntary. Almost all the exceptions arise when two persons involved in a collision, whether personal or by cars, are both anxious to make statements to the police blaming each other, or when a person is caught redhanded and wants to make excuses. Motorists usually make statements, but they would not if they were not well aware that their failure to do so would probably incur

unfavourable comment in the event of a prosecution. They are frequently, notwithstanding " the usual caution," pressed to do so. Sometimes they are supplied with copies of the statements they have made, sometimes not, and sometimes the police refuse to furnish copies even when askd to do so.

Motorists, however, are as a body in a better position than other accused persons. Frequently their Insurance Companies see to their defence, and in many other cases the R.A.C., the A.A., or the Transport Workers' Union does so. With regard to the general body of accused persons, it would be more in accordance with the principle of the presumption of innocence, which is the basis of our system of criminal justice, that no statement made by a prisoner, after arrest or while under detention, should be admissible in evidence against him. What he genuinely wishes to say can best be said in the witness-box on oath, under the supervision of the Court. Anyone who has had experence of taking statements from disinterested witnesses, who have no motive for saying anything but the truth, knows how difficult it is to get a true story. What likelihood can there be of getting the truth, or even part of the truth, when a statement is taken by an interested person from an interested person, even assuming that both are trying to be honest about it ? With regard to the length of time taken in making, or perhaps extracting would be a better word, statements, and the conditions under which so-called " voluntary statements " are made, reference should be made to the Report, pages 65 to 68, pars. 170 to 177, and pages 101 and 102, pars. 268 to 270. The recommendations of the Committee are to be found on pages 118 and 119 of the Report, Nos. 49 to 55, and page 123, Nos. 89 and 90. The main points of the recommendations are that, in order to ensure that the statements made by persons charged are really voluntary and accurate, such statements should be written down by the prisoner himself, no one else being present, and if the prisoner asks for his statement to be taken down, the request must be in writing and his actual words taken down. Questions, put to clear up ambiguities and the answers, should be set down verbatim. Two officers, one of whom should be the officer in charge of the station, should always be present when a prisoner dictates a voluntary statement. A prisoner making a voluntary statement should be entitled, if he so desires, to have his legal adviser present. The Commission says that:

> " we have received a volume of responsible evidence which it is impossible to ignore, suggesting that a number of the voluntary statements now tendered in Court are not " voluntary " in the strict sense of the word."

It is useful to get a general idea of the methods used by the police when investigating a crime. " Malice Aforethought," by Francis Iles, contains a fair and interesting, though of course fictitious example of these methods. In this story the person concerned, however, is a clever professional man, standing in no awe of the police.

The Commission recommended that it should be clearly laid down that no Police Officer should be permitted to give any advice to a person in custody with regard to how he should plead. (See Report, p. 123, No. 92.) That accused persons in many Summary Courts and at some Quarter Sessions, receive more lenient treatment when they plead guilty, everyone with extensive experience of the courts knows. In " Police Courts " magistrates often openly say what they have done in this respect. At Quarter

Sessions, when there is a heavy list, most counsel have had experience of the informal understandings that are arrived at with regard to pleas of guilty and lenient treatment. That the police often advise accused persons to plead guilty no one with experience of the courts can truthfully deny. Not only are accused persons so advised, but their legal advisers also. The writer has many times received open and friendly suggestions from the police that a plea of guilty would be much better for a client than the strenuous defence which he was instructed to put forward. On the whole it is probable that the advice to plead guilty is quite as often due to a genuine desire on the part of the police to help the accused as to a wish to save themselves time and trouble. The police have no illusions as to the chances of a fair trial before the Courts of Summary Jurisdiction.

The recommendation of the Commission that the police should not be allowed to advise accused persons as to how they should plead is obviously right. But until the "Police Courts" are reformed, a plea of guilty, even by an innocent person, may often be the best course. There are too many benches not in agreement with the words of the Chief Metropolitan Magistrate, quoted on p. 104 of the Report:

> "Every person is entitled to defend himself. It would be a monstrous thing if, because he exercised that right, you were to give him more punishment."

The question of voluntary statements, to which reference has already been made, needs further consideration with regard to the time occupied, the methods of taking the statement, and the persons present. Further reference should be made to the Report on p. 115 for the recommendations of the Commission (Nos. 16 to 23) and to pages 26 to 38, pars. 65 to 97. It is, for the reasons mentioned on p. 33, par. 83 of the Report, difficult to lay down hard and fast rules, but it certainly appears that three points are essential:

(*a*) Every person should be told of his right not to make a statement.
(*b*) He should have the right to have his legal adviser present when his statement is taken, and be told of such right.
(*c*) The hours when statements can be taken should be strictly limited.

We are here dealing with statements made by witnesses as well as with those made by accused persons. There is a point of importance with regard to the statements of witnesses which is only known to those with practical experience in the courts. Both in Summary Cases and in taking depositions, it is very usual (though irregular) for justices' clerks to use proofs taken by the police, instead of themselves taking notes of the evidence actually given. It not infrequently happens that a statement which a witness has not given in the box is alleged to have been made. The writer has occasionally embarassed a clerk by asking to see the actual note. But this practical point adds to the importance of statements being properly taken. Incidentally, witnesses often attempt to learn their proofs by heart, and the writer has even seen a witness produce a proof from his pocket and begin to read from it!

The question of *Agents Provocateurs* has become of greater public importance since 1929, when the Report was issued, and there is evidence of the increasing use of such methods, especially since the war. The Report recommends (page 116, No. 27) that the police should, as a general rule,

observe only, without participating in, an offence and that where participation is essential, it should be resorted to only on the written authority of the Chief Constable, in cases where the offence is habitually committed in circumstances in which observation by a third party is *ex hypothesi* impossible. It is submitted that it is of vital importance that a record of the issue of such written authorities should be kept, and should be accessible to accused persons and those representing them.

The Report (page 116, No. 32) recommends that the officer in charge of a case should not be present at an identification parade. This is desirable, but a blank parade, with the accused not present, would be a useful addition. Identification parades are probably, on the whole, fairly conducted, and the main trouble arises from the fact that it is sometimes contrived that a witness shall have a look at an accused person before the parade. This is done by taking the prisoner, on one excuse or another, within sight of the proposed witness, sometimes at the station, sometimes elsewhere. The writer has known an arrested man taken nearly half a mile out of his way so that he might pass the house of a prospective witness.

The report made by the police upon the character and antecedents of a convicted person has a great influence upon his punishment, in most courts. This places power in the hands of the police to bring pressure to bear upon a prisoner to give them information of various kinds, and also enables them to get rid of troublesome persons for considerable periods. Courts differ widely as to what they will, or will not, accept from the police in the way of a report. A common statement, and one very difficult to rebut, is that the prisoner "is an associate of thieves" or "the leader of a gang." The Report sets out on page 50, par. 135, what is submitted to be the proper course:

> "The duty of the police in the matter should thus be confined to furnishing information which is available from their own records and from enquiries made with the prisoner's consent, and we think that this information should be confined to facts which the Police should give on oath.
>
> It has been represented to us that the statements as to character given by the Police are not always confined to facts which they have ascertained, but sometimes include impressions or opinions which they have formed as to the accused's manner of life or the character of his associates. We think that the Police should only depose to facts within their knowledge, and should refrain from expressing opinions which may be incapable of proof or disproof."

It should be added that the Report was unanimous, and without Reservations of any kind. The Commissioners emphasized the effort they had made to report as soon as possible, because they believed that the issues raised in their Terms of Reference should not be left undetermined a moment longer than was necessary. (See Report, page 125.)

The Committee might have spared themselves trouble. In over fifteen years very little has been done to put their recommendations into practice.

"SOLICITOR."

Printed by The Maybank Press Ltd. (T.U.), 24 High Road, S. Woodford, London, E.18